

FEATURE

Language as a Social Determinant of Access to Justice

Michelle du Toit

Introduction

The social determinants of socio-economic rights such as access to justice include the political economy, the ability to physically access justice, the affordability of justice, the availability of recourse to justice, and education and information on rights and remedies. Various social factors affect the accessibility of justice. A prominent such factor is language: if people do not have information about their rights in a language they understand, then their access to justice is limited. Communicating about injustice in a language other than one's mother tongue can be a huge hindrance to judicial recourse and democratic participation.

Goal 16 of the United Nations (UN) Sustainable Development Goals (SDGs) and aspiration 3 of the African Union (AU) Agenda 2063 pertain to justice, yet fail to consider the issue of language in the pursuit of realising the right of access to justice. Arguably, the targets of goal 16 of the SDGs should consider language in seeking to promote the rule of law and ensure equal access to justice for all. The targets pertaining to accountability, transparency, and participatory practices should also consider the issue of language.

Language can encumber people's ability to participate in the pursuit of justice from a personal level to an international institutional level. This article demonstrates the importance of language as a social determinant of access to justice in all aspects of SDG goal 16, and then identifies potential means of overcoming this barrier to realising goal 16.



'If you talk to a man in a language he understands, that goes to his head. If you talk to him in his language, that goes to his heart' – Nelson Mandela

Social determinants of access to justice

There are various determinants of access to justice. Physical access serves as a good example – if people cannot physically get to, say, a legal aid clinic, then they do not have access to justice. Similarly, financial affordability and the availability of information are de-

terminants of access to justice. Other rights also serve as determinants of access to justice. For instance, if a person does not have access to education providing information about legal rights and the government's obligations to its people, then he or she does not have

access to justice in terms of legal services or in terms of participatory democracy (UNDP 2013: 11, 20).

As the United Nations Population Fund (2005) notes, human rights are interdependent on each other, as ‘each one contributes to the realization of a person’s human dignity through the satisfaction of his or her developmental, physical, psychological and spiritual needs’. The principle of interrelatedness recognises that the fulfilment of one right is often dependent on the fulfilment of other rights. In South African jurisprudence, this principle was articulated by Yacoob J in *The Government of the Republic of South Africa v Grootboom* (2001 (1) SA 46), at paragraph 23:

Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied to those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2 [of the Constitution].

Whilst this refers specifically to the relationship between socio-economic rights and civil and political rights, it illustrates how the fulfilment of one right can affect the fulfilment of others. Likewise, the fulfilment of the right to access to justice is not possible if people do not have rights, among other things, to information, education and participation.

The UN SDGS and AU 2063 Agenda

The UN’s SDG 16 is to ‘[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’. The goal entails promoting the rule of law, ensuring inclusive participatory decision-making, strengthening participation, and ensuring public access to information. In turn, the AU Agenda 2063 envisages an ‘integrated, prosperous and peaceful Africa’ and aspiration 3 seeks to achieve

Language is a determinant of access to justice. If information about rights, governance, and participatory democracy is not accessible to persons due to a language barrier, their access to justice is hindered. Even where people have been educated and information about rights and obligations is available, their access to justice is compromised if the information is not in a language they understand.

Arguably, in the same way as doctors are expected to explain procedures to patients in an understandable manner, states should be obligated to ensure that citizens can understand the laws, rights and obligations of the state. This would not only be to the benefit of the citizens but also guarantee that participatory democracy is possible – for people cannot participate if they do not understand. They need to understand the law in order to rely on the law (Maru 2017).

In an age when there is such an emphasis on diversity and inclusion, allowance should be made for this in the law, especially with regard to something as fundamental as access to justice. South Africa, for example, has 11 official languages, so information (and thereby access to justice) should be provided in least all of these languages. Furthermore, in areas where there are varying degrees of education and illiteracy is prevalent, provision should also be made for the manner in which legal information is made available.



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‘[a]n Africa of good governance, democracy, respect for human rights, justice and the rule of law’. In terms of this aspiration, the ‘continent’s population will enjoy affordable and timely access to independent courts and judiciary that deliver justice without fear or favour’.

These two instruments coincide with each other as they pursue similar aims of inclusive participation, access to information, promotion of the rule of law, equal access

to justice, and respect for human rights. However, they fail alike to recognise the fundamental role that language plays in seeking such ends. These aspirations are unachievable if language barriers are not addressed. Without a proper examination of how language acts as a barrier to access to justice in the sense conveyed by the AU Agenda 2063 and the UN SDGs, access to justice for all will remain a distant, unattainable vision.

Language should be considered by such goals and aspirations, as it is vital to their realisation. If people

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While working in a legal aid clinic, I had an experience that made me start learning more South African languages. I had a woman come in with her nine-year-old daughter. It was a sensitive matter, with the end result being the need for a restraining order against the woman's boyfriend. She had her daughter come into the consultation room. She did this because she could not speak English well enough to explain to me what had happened. My isiXhosa at that stage was minimal, so I had the young girl translate for me. We had translators, but the woman declined using them as she had already prepared her daughter for the task.

This heart-breaking experience raised numerous questions in my mind. Would I be able to explain something that had happened to me in my second language? Would I be reassured by any advice or help I receive in a language other than my mother tongue? How enthusiastic would I be about participating in the democratic governance of the country if I were not able to engage in my own language? Furthermore, what additional issues would I be able to resolve if I had access to information about rights and obligations available to me in my language? What if someone qualifies for a grant but does not know they do, or even that they can get one, because there is no understandable information

are unable to learn about the rule of law, participatory democracy, or human rights as a result of a language barrier, how could such goals be attained? The failure to recognise the fundamental nature of language as an underlying condition for the realisation of these goals is concerning and raises doubt about their attainability. Given the emphasis placed on inclusivity in these instruments and the fact that Africa has great diversity in languages, one would think there would be at least some recognition of this.



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available to them about this?

South Africa makes provision for requests of legislation in the language of your choosing – but this presupposes that you understand English well enough to know this is possible. Additionally, we also need to consider the illiterate when we look at countries with varying degrees of education and access to education. When illiteracy rates are high, then arguably there is all the more reason to ensure that legal information is available to people in an understandable manner *in their first language*. In the absence of this, people are denied access to information, which has implications for their place in democratic society, their realisation and access to other rights, and their respect for the rule of law.

The Constitution of South Africa states that the country is founded on the values of '[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms'. With these values in mind, access to justice is essential for ensuring that the rights guaranteed in the Constitution are both protected and realised. However, for this to materialise, barriers need to be addressed. Language, and the barrier it can pose to the right of access to information, to understanding of rights, and ultimately to access to justice, is an

aspect of law which has been neglected and requires more attention, especially in a country with 11 official languages. Making the law understandable through language accessibility should be at the forefront of agendas for development and promotion of the rule of law.

Kofi Anan, former United Nations Secretary-General noted the following:

The United Nations has learned that the rule of law is not a luxury and that justice is not a side issue. We have seen people lose faith in a peace process when they do not feel safe from crime. We have seen that without credible machinery to enforce the law and resolve disputes, people resorted to violence and illegal means and we have seen that elections held when the rule of law is too fragile seldom lead to lasting democratic governance. We have learned that the rule of law delayed is lasting peace denied, and that justice is a handmaiden of true peace. We must take a comprehensive approach to justice and the rule of law. It should encompass the entire criminal justice chain, not only police, but lawyers, prosecutors, judges and prison officers, as well as many issues beyond the criminal justice system.

Anan holds that justice is not a side issue but a matter that affects every aspect of society and governance, and the same may be said of language: without language, without communication, we cannot have understanding, and without understanding, we cannot pursue our aspirations and goals. To achieve access to justice, there must first be an understanding of how

justice affects or is present in the lives of people. It is estimated that 4.5 billion people are excluded from the social, economic, and political opportunities the law provides (Task Force on Justice 2019). Justice and the rule of law are undeniably interconnected and interrelated. They are also central to ensuring the realisation of other rights. This is evident in the UN SDGs, where justice is a consistent thread throughout all 17 goals.

The United Nations Development Programme (UNDP) (2013) makes a pertinent observation:

Where people are knowledgeable about their rights and the mechanisms to access them and have means of access, then attaining human rights becomes a possibility. Nonetheless, either as a result of underlying vulnerabilities such as poverty, disability, social status, gender or technical barriers such as language, distance to the justice systems, corruption or court technicalities, people may lack knowledge and may have neither the voice nor the means to fulfil their rights. As a result, justice remains elusive for the vast majority of the population who are still unable to access not only civil and political but also social and economic rights.

Language, I argue, is also fundamental to the realisation of other rights. Language is the first barrier to overcome in educating people that they have enforceable rights; that there are means by which to enforce these rights; that there are ways to participate in democratic government; and in respecting the rule of law. Without language, these rights are not accessible.



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Overcoming the challenge

Geraldine Fraser-Moleketi, the director of the Democratic Governance Group in the Bureau for Development Policy in the UNDP, notes that

[[l]aw, legal and judicial institutions are crucial to reducing poverty, strengthening social and economic equality, and achieving human security and development, and they should therefore be people centred. In that regard, rule of law, accessible legal and judicial institutions, and a legally empowered citizenry facilitate the enjoyment of social, economic and political justice and its benefits should be all inclusive and sustainable. Such an understanding helps to ground law and justice considerations in a sustainable human development agenda. However, measures taken to strengthen the rule of law and enhance access to justice have tended to focus more on enacting rules and developing frameworks and institutions. The transformative role of law, legal and judicial institutions and legal empowerment have not been fully explored and as such, it is often difficult to present evidence of impact from decades of legal and judicial reforms.

The AU Agenda 2063 and the UN SDGs need to recognise the role of language in realising their aspirations and goals. Recognising language in this regard will ensure inclusivity and respect for diversity. Furthermore, provision needs to be made for the illiterate. But recognising language is not enough alone to address adequately the relationship between access to justice and language. Perhaps a bigger question is, Why are the law and agendas to transform the law still confined to pen on paper when the majority of the world is barred from access to them?

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References

African Union (2016) Agenda 2063.

Maru V (2017) 'How to put the power of law in people's hands' Ted.com. Available at <http://bit.ly/3a90gqj>

Task Force on Justice (2019) Justice for All. New York: Center on International Cooperation. Available at <https://www.justice.sdg16.plus/>

United Nations Development Programme (2013) Rule of Law and Access to Justice in Eastern and Southern Africa

United Nations Population Fund (2005) Human Rights Principles. UNFPA

United Nations Sustainable Development Goals 2030. Transforming our world: The 2030 Agenda for Sustainable Development A/RES/70/1. Available at www.sustainabledevelopment.un.org



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